91-28

Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MATTIE LOU THOMAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a district court has authority to impose a probationary sentence pursuant to a departure statute where the statute defining the offense of conviction contains language expressly prohibiting sentences of probation?

II.

Whether the statute authorizing downward departures for substantial assistance to authority permits the sentencing court to consider factors not related to the quality of assistance?

III.

Whether extraordinary familial circumstances are ever a proper basis for downward departure under the guidelines where probation is not an option?

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioner Mattie Lou Thomas respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 930 F.2d 526 (7th Cir. 1991), and is attached hereto at Appendix A.

JURISDICTION

On April 11, 1991, the United States Court of Appeals for the Seventh Circuit vacated the petitioner's sentence of probation and remanded to the district court for resentencing. On April 25, 1991, the petitioner filed a Petition For Rehearing. The rehearing petition was denied on May 23, 1991. *See* Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 841(a) of Title 21 of the United States Code provides:

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(a).

Section 841(b) of Title 21 of the United States Code provides in pertinent part:

Penalties

(b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; . . .

Such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and

shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term imprisonment. Notwithstanding any other provision or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 841(b).

Section 3553(e) of Title 18 of the United States Code provides:

(e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e).

Section 5H1.6 of the United States Sentencing Guidelines provides:

***Family Ties and Responsibilities, and Community Ties* (Policy Statement)**

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and respon-

sibilities that are met may be relevant in the determination of the length and conditions of supervision.

United States Sentencing Guidelines, §5H1.6.

Section 5K1.1 of the United States Sentencing Guidelines provides:

Substantial Assistance to Authorities
(Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

United States Sentencing Guidelines, §5K1.1.

STATEMENT OF THE CASE

Petitioner Mattie Lou Thomas was charged in a single count indictment with possession of heroin with intent to deliver. The United States District Court for the Northern District of Illinois had jurisdiction pursuant to 21 U.S.C. §841(a). Thomas entered into a written plea agreement with the government, by which she agreed to plead guilty to the offense charged in the indictment, and also to cooperate with the government. In return, the government agreed to evaluate Thomas' cooperation and to "request a departure from the guidelines and the statutory minimum under Section 5K1.1" if appropriate. Because the offense occurred after November 1, 1987, the sentencing guidelines were implicated.

Thomas' sentencing hearing spanned three sessions. At the initial session, the government formally moved for a departure under Section 5K1.1 of the Guidelines and reported to the district court on Thomas' cooperation. The government informed the court that Miss Thomas' cooperation had led to the arrest and indictment of her contact for the importation of heroin from Thailand. The government recommended a sentence of approximately six years or a little more than half of the applicable guideline range. In mitigation, Thomas offered evidence of her extremely burdensome family responsibilities. As summarized by the court below:

> Each of Thomas's three adult children is mentally disabled. Two live with Thomas; one is institutionalized. Thomas is also the legal guardian of a four year-old grandson. She cares for her children alone; Thomas last saw her husband in 1984.

United States v. Mattie Lou Thomas, No. 90-2183, Slip op. at 6 (7th Cir. 1991); Appendix A.

After considering the parties' oral and written submissions and the Presentence Investigation Report, the district court sentenced Thomas to a term of five years probation. As conditions of the probation sentence, the district court ordered Thomas to continue her cooperation with the government and to perform 1200 hours of community service work. The government appealed this sentence.

On appeal, the Seventh Circuit vacated Thomas' sentence of probation and remanded to the district court for resentencing. Appendix A. In particular, the Seventh Circuit held that a sentence of probation was prohibited under the language of 21 U.S.C § 841(b), and that Thomas' extraordinary familial circumstances were an improper basis for a downward departure.

REASONS FOR GRANTING THE WRIT

I.

THE FINDING OF THE SEVENTH CIRCUIT THAT STATUTORY LANGUAGE PROHIBITING PROBATION TRUMPS THE LANGUAGE OF THE DEPARTURE STATUTE, PERMITTING THE SENTENCING JUDGE WIDE DISCRETION TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM, CONFLICTS WITH THE DECISIONS OF THE FOURTH CIRCUIT ON THE SAME MATTER.

This case gives this Court the opportunity to resolve an important question of federal law regarding the reconciliation of conflicting sentencing provisions, and to also resolve a split among the two circuits which have considered this issue.

The district court was faced with two conflicting statutory schemes in sentencing Mattie Lou Thomas. The plain language of the drug trafficking statute (21 U.S.C. § 841(b)), to which Thomas pled guilty, prohibits a sentence of probation. Specifically, this statute states, in pertinent part:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

21 U.S.C. § 841(b). This statute clearly indicates the intent of Congress to limit the discretion of the sentencing court and to prevent sentences of probation.

However, the district court was also bound to consider the language of the departure statute (18 U.S.C. § 3553(e)), triggered in this case, as it must be, by the government's own motion. This statute states, in pertinent part:

> Upon motion of the government, the court shall have the authority to impose a sentence below a level established by the statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

18 U.S.C. § 3533(e).[1] The plain language of section 3553(e) permits a sentencing court wide discretion to impose a sentence below a statutory minimum so as to reflect a defendant's substantial assistance to the government. This statute clearly reflects the intent of Congress to entice criminal defendants, facing harsh penalties, to cooperate with the authorities, and, in most cases, to forego signifi-

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[1] Because Thomas was sentenced under the United States Sentencing Guidelines, the district court was also bound to consider Section 5K1.1 of the Guidelines relating to departures for substantial assistance to authorities.

cant constitutional protections and subject themselves and their families to physical danger and scorn. *See United States v. Daiagi*, 892 F.2d 31, 32 (4th Cir. 1989) ("Section 3553(e) was intended by Congress to provide an incentive to defendants to furnish assistance to law enforcement officials by moderating the rigorous inflexibility of mandatory sentences where the offender had rendered substantial assistance to the Government.") The wide open language of section 3553(e), free from any prescribed guidelines for computing the extent of a departure, suggests that Congress did not intend to limit the discretion of the trial court to depart downward nor limit the incentive for a defendant to provide valuable assistance to the government.

The district court resolved this statutory conflict in favor of the departure statute. This decision was based, in part, upon two Fourth Circuit cases, *United States v. Daiagi*, 892 F.2d 31 (4th Cir. 1989); *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990), both holding that the district court's authority to depart downwards under section 3553(e) was not limited by a general statute banning probation for all Class A and B felonies.

On appeal by the government, the Seventh Circuit reversed the ruling of the district court and vacated Miss Thomas' sentence of probation. The Seventh Circuit found that the district court's reconciliation of the conflicting statutes "renders the probation ban meaningless." *United States v. Mattie Lou Thomas*, No. 90-2183, Slip op. at 3 (7th Cir. 1991); Appendix A. The Court found the decisions of the Fourth Circuit in *Daiagi* and *Wilson* "easily distinguished", even though these cases would appear to directly support the district court's ruling that it was authorized to sentence Thomas to probation. *Thomas*, Slip op. at 4. In *Daiagi* and *Wilson*, the Fourth Circuit held

that the district court's authority to depart downwards under section 3553(e) was not limited by a general statute banning probation for all Class A and B felonies.

The court below attempted to distinguish *Daiagi* and *Wilson* on two grounds. First, the statutes involved in those cases did not contain both a minimum mandatory sentence and a prohibition against probation as does 21 U.S.C. § 841(b). Second, the clause prohibiting probation, considered by the Fourth Circuit, did not contain language similar to the "notwithstanding any other provision of law" language of Section 841(b). However, the Seventh Circuit ignored the fact that the Fourth Circuit decisions are not narrowly confined but instead set forth broad principles relating to downward departures which directly conflict with the decision of the court below. The *Daiagi* court stated:

> As we view Section 3553(e), there is no logical distinction between the two situations, i.e., between the mandatory minimum sentence and the prohibition against probation. The statute was intended to free the sentencing judge to exercise, on motion of the Government, a prudent discretion by disregarding, where there has been substantial governmental assistance by the defendant, *both* the affirmative mandate to impose a minimum prison sentence and the negative mandate of Section 3561(a)(1) not to grant probation to a Class A or B offender.

Daiagi, 892 F.2d at 33 (emphasis added; footnote omitted). Similarly, in *Wilson*, 896 F.2d at 859, the Fourth Circuit stated that "[u]nder the literal terms of [Section 3553(e)], there is no lower limit placed on the court's authority, and no straining of the statute is necessary to arrive at that conclusion."

Thus, *Daiagi* and *Wilson* are broad decisions setting forth the general principle that Section 3553(e) frees a sentencing court to disregard both mandatory minimums *and* prohibitions against probation. The fact that the probation ban of Section 841(b) includes the "notwithstanding any other provision of law" language does not make it other than it is—a clause prohibiting probation. *Daiagi* and *Wilson* explicitly hold that Section 3553(e) frees a sentencing court to disregard such a clause. As the Seventh Circuit's decision directly conflicts with these decisions, this Court should grant certiorari to resolve the important question regarding a district court's authority to disregard a statutory prohibition against probation in imposing sentence under a departure provision.

II.

THE SEVENTH CIRCUIT'S RULING THAT GUIDELINE SECTION 5K1.1 PROHIBITS DEPARTURE BASED ON FACTORS UNRELATED TO THE QUALITY OF ASSISTANCE RENDERED CONFLICTS WITH THE DECISION OF THE FOURTH CIRCUIT AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 3553(e) authorizes departures upon government motion "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e). Section 5K1.1 of the Guidelines provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

U.S.S.G. §5K1.1.

The Court below determined that these provisions support the view that only factors relating to a defendant's cooperation should influence the extent of such a departure. The Court noted that the list of factors contained in Section 5K1.1 of the Guidelines is not intended to be exhaustive, but that "each of the factors listed concerns circumstances bearing upon the significance of a defendant's cooperation, such as its utility, reliability, risk, and timeliness." *Thomas*, Slip op. at 5. The Court then applied the principle of *ejusdem generis* to reach the conclusion that "§ 5K1.1 permits departure only on the basis of the quality of the assistance rendered." *Id.* at 5-6.

In contrast, the Fourth Circuit took an opposite view as to the meaning of Section 5K1.1 of the Guidelines.

> Under "Substantial Assistance to Authorities," § 5K1.1, there is no indication of any limit on the district court's authority to depart from the Guidelines. Indeed, that section explicitly provides for an "appropriate reduction" which shall be determined by the court for reasons stated, which may include, *but are not limited to*, the significance of the assistance, the truthfulness and reliability of the information, the nature and extent of the assistance, the injury suffered or risk of injury or danger to the defendant, and the timeliness of the assistance.

United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990) (emphasis added). As the Seventh Circuit's decision conflicts with the Fourth Circuit decision, this Court should grant certiorari to resolve the conflict.

More importantly, whether "substantial assistance" departure sentences may be based on factors unrelated to the defendant's cooperation is an important question of federal law which has not been, but should be, settled by this Court. The language of the relevant Guideline provisions do not provide a definitive answer. Section 5K1.1 contains a list of five factors all relating to the defendant's cooperation, but explicitly states that this list is nonexhaustive.

This issue involves important policy considerations. Will a criminal defendant be less inclined to provide assistance to the government if he knows that the sentencing judge will be prevented from considering any factors unrelated to his cooperation in determining the extent of departure? Would Mattie Thomas have agreed to subject herself and her family to the substantial risks connected with gathering evidence against big-time heroin importers had she known that the sentencing judge would be prevented from considering her extraordinary family responsibilities?

Every day, agents of the government are trying to persuade persons charged with crimes to cooperate in exchange for the possibility of a lighter sentence. The issues involved in this case are intimately intertwined with every defendant's decision whether or not to cooperate. As these questions have been left open by the legislators, they should be settled by this Honorable Court.

III.

THE FINDING OF THE SEVENTH CIRCUIT THAT THE DISTRICT COURT IS NOT PERMITTED TO CONSIDER, UNDER THE SENTENCING GUIDELINES, A DEFENDANT'S EXTRAORDINARY FAMILY CIRCUMSTANCES CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS ON THE SAME MATTER.

While the court below did take notice of the extreme nature of Thomas' familial responsibilities,[2] it nevertheless concluded that such factors were improperly considered by the sentencing court. The Seventh Circuit noted the language of § 1B1.4 of the guidelines which authorizes a sentencing court to "consider, without limitation, any information concerning the background character and conduct of the defendant, unless otherwise prohibited by law." *Thomas*, Slip op. at 6. The Court concluded, however, that § 5H1.6 of the guidelines expressly prohibits the sentencing court from considering even extraordinary

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[2] The Seventh Circuit noted that "[e]ach of Thomas's three adult children is mentally disabled. Two live with Thomas; one is institutionalized. Thomas is also the legal guardian of a four year-old grandson. She cares for her children alone; Thomas last saw her husband in 1984." *Thomas*, Slip op. at 6.

family circumstances except where the guidelines provide probation as an option.[3] *Id.* at 7.

In contrast, the other circuits that have considered this issue have consistently held, either expressly or impliedly, that extraordinary family circumstances may form a basis for a downward departure. *See United States v. Brand*, 907 F.2d 31 (4th Cir.), *cert. denied*, 111 S. Ct. 585 (1990); *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990); *United States v. Brewer*, 899 F.2d 503 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990); *United States v. Burch*, 873 F.2d 765 (5th Cir. 1989); *United States v. Shortt*, 919 F.2d 1325 (8th Cir. 1990). In particular, the Seventh Circuit's reading of guideline section 5H1.6, as prohibiting consideration of family circumstances where probation is not an option, is contrary to every other circuit's reading of that provision. Each circuit that has considered this question, has read Section 5H1.6 to apply only to ordinary family circumstances, not extraordinary ones. Thus, Section 5H1.6 prohibits consideration of *ordinary* family circumstances as grounds for departure where probation is not an option.

For example, in *Shortt*, the Eighth Circuit held that the defendant's family circumstances could not form the basis

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[3] Section 5H1.6 of the Guidelines states:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

U.S.S.G. § 5h1.6 (1991).

for a downward departure where there was no showing that his circumstances were extraordinary. The Court stated:

> All families suffer when one of their members goes to prison. That is why family circumstances are not, in the words of the policy statement, "ordinarily relevant." U.S.S.G. § 5H1.6. Shortt's case is not extraordinary. It is not outside "the heartland" of cases the Guidelines are designed to cover.

Shortt, 919 F.2d at 1328. In *Deigert*, the Fourth Circuit explicitly stated:

> To the extent §§ 5H1.1-5H1.6 factors might relate this case, the Guidelines permit departure when the circumstances are extraordinary. Whether or not factors are extraordinary is a question of fact to which the clearly erroneous standard applies on appeal.

Deigert, 916 F.2d at 919 (citation omitted). *See also Brand*, 907 F.2d at 33 ("there are doubtless circumstances in which unique family responsibilities might justify a downward departure"); *Burch*, 873 F.2d at 768 (factors such as family and community ties are "generally irrelevant, except in extraordinary cases"). Thus, the Seventh Circuit's reading of guideline section 5H1.6, as prohibiting consideration of family circumstances where probation is not an option, is in direct conflict with every other circuit's reading of that provision.[4]

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[4] In its opinion, the Seventh Circuit cited three cases which are said to support the Court's reading of Section 5H1.6. *Thomas*, Slip op. at 6-7. However, neither of these opinions state, explicitly or implicitly, that the Guidelines prohibit consideration of extraordinary family circumstances where probation is not an option. *Thomas*, Slip op. at 6-7.

The first case cited as support, *United States v. Brady*, 895 F.2d 538 (9th Cir. 1990), is inapplicable in that it has nothing to do with

(Footnote continued on following page)

Whether extraordinary family circumstances may form a basis for downward departure under the Guidelines is an important question which will undoubtably arise with great frequency in Guideline sentencing. As the Seventh Circuit's resolution of this issue is completely out of step

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[4] *continued*

departures. *Brady* involved a due process challenge to the guidelines in which the defendants alleged that the guidelines did not afford sufficient weight to individual characteristics such as family and community standing or psychological condition. *Brady*, 895 F.2d at 543. The Ninth Circuit held that the guidelines did not violate due process, either facially or as applied to the defendants. *Id.* at 544.

In the second case, *United States v. Sutherland*, 890 F.2d 1042, 1043 (8th Cir. 1989), the defendant argued on appeal that the trial court erred in failing to depart downward to reflect his "unusual family responsibilities." The Eighth Circuit rejected this challenge in a brief paragraph in which the court cited the language of § 5H1.6 stating that "family ties and responsibilities . . . are not ordinarily relevant". *Id.* There is no evidence, argument or discussion, in *Sutherland*, as to whether the defendant's family circumstances were anything other than ordinary. Thus, that case is also inapplicable and cannot be said to support the Seventh Circuit's decision.

The third case, *United States v. McHan*, 920 F.2d 244 (4th Cir. 1990), involves the issue of charitable contributions and not family circumstances. *McHan* involved a defendant's challenge on appeal to the district court's refusal to depart downward based on his charitable contributions. The Fourth Circuit held that charitable contributions are not proper grounds for departure because it would, in effect, reward successful drug dealers with a lower sentence. *McHan*, 920 F.2d at 248. The Fourth Circuit said nothing about factors relating to family circumstances or any of the other factors of Sections 5H1.1 through 5H1.6 of the Guidelines. Moreover, if the Fourth Circuit had intended for *McHan* to support the proposition for which the Seventh Circuit cited it, the court would certainly have made reference to its prior decisions in *United States v. Brand*, 907 F.2d 31 (4th Cir. 1990), and *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990), where the court stated that extraordinary family circumstances would support a downward departure.

with the other circuits, this Court should grant certiorari to resolve this conflict.

CONCLUSION

WHEREFORE, Petitioner Mattie Lou Thomas respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-2183

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MATTIE LOU THOMAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 131—**Milton I. Shadur**, *Judge.*

ARGUED FEBRUARY 26, 1991—DECIDED APRIL 11, 1991

Before FLAUM, RIPPLE, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge.* After she was arrested for possessing almost 4 kilograms of heroin, Mattie Lou Thomas decided to cooperate with the continuing government investigation of her associates. Her assistance earned her a government recommendation, pursuant to 18 U.S.C. § 3553(e), for a six-year sentence in lieu of the otherwise mandatory ten-year prison sentence applicable to her crime. See 21 U.S.C. § 841(b)(1)(A). The district court, however, gave the prosecution more than it bargained for, sentencing Thomas to probation. The government appeals, asserting that 21 U.S.C. § 841(b)(1)(A)(i) does not permit the

district court to enter a sentence of probation and that the size of the district court's downward departure was unreasonable. We agree and remand the case to the district court for resentencing.

18 U.S.C. § 841(b) provides that:

> Except as otherwise provided in Section 845, 845a or 845b of this title, any person who violates subsection (a) of the section shall be sentenced as follows:
>
> (1)(A) [for violations involving more than one kilogram of heroin] such person shall be sentenced to a term of imprisonment which may not be less than 10 years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

As an initial matter, one might ask why the last sentence quoted above is necessary. If a ten-year sentence is mandatory, why was it necessary to affirmatively prohibit a sentence of probation? The simple answer is that the ten-year sentence is not mandatory. 18 U.S.C. § 3553(e) gives the court, on motion of the government, limited authority to impose a sentence below a statutory minimum, "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The question we face is whether, for defendants convicted of violating 21 U.S.C. § 841(a), 18 U.S.C. § 3553(e) authorizes sentencing judges to reduce only the term of imprisonment or if it also permits the judge to impose probation in lieu of imprisonment.

The district court adopted the latter interpretation. The court reasoned that, in responding to the government's motion, it was sentencing Thomas "under" 18 U.S.C. § 3553(e) rather than "under" 21 U.S.C. § 841(b), making the probation prohibition of § 841(b)(1)(A) inapplicable. The court concluded, therefore, that it was free to consider probation as a sentencing alternative. The court found *United States v. Diagi*, 892 F.2d 31 (4th Cir. 1989), analogous. In *Diagi*, the court held that § 3553(e) authorized the district court to sentence the defendant to probation

even though 18 U.S.C. § 3561(a)(1) provides that "[a] defendant who has been found guilty of an offense may be sentenced to a term of probation unless (1) the offense is a Class A or Class B felony . . . ." Diagi had been convicted of conspiring to distribute cocaine in violation of 21 U.S.C. § 846.[1] The *Diagi* court reasoned that "there is no logical distinction . . . between the mandatory minimum sentence and the prohibition against probation. The statute [§ 3553(e)] was intended to free the sentencing judge to exercise, on motion of the Government, a prudent discretion by disregarding, where there has been substantial governmental assistance by the defendant, both the affirmative mandate to impose a minimum prison sentence and the negative mandate . . . not to grant probation . . . ." *Id.* at 33. The district court found that view persuasive, and concluded that § 3553(e) authorized him to disregard both the ten-year statutory minimum sentence and the ban on probation contained in § 841(b).

We must respectfully disagree. The district court's interpretation renders the probation ban meaningless. If departure pursuant to § 3553(e) means that defendants are not sentenced "under" § 841(b), there can never be occasion to invoke the probation ban. The presence of the probation ban in a section that imposes a statutory minimum means that there must be some other provision of law that permits the court to impose a sentence below that statutory minimum. That provision is § 3553(e). Congress effectively eliminated probation by creating a statutory mini-

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[1] The *Diagi* court apparently regarded this offense as a Class B felony. At the time, however, Class B felonies were those offenses carrying maximum sentences of twenty years or more (the definition has since been modified to include only offenses carrying maximum sentences of twenty-five or more years). Violations of 21 U.S.C. § 846 carried, at the time, a maximum penalty of fifteen years, which could be increased to thirty years for a second conviction for that offense. The court's opinion did not indicate whether Diagi had previously been convicted of a drug offense, and thus it is not clear from the opinion whether his conviction was, in fact, a Class B felony.

mum; it needed the probation ban only to limit the discretion given to sentencing courts by § 3553(e) to depart from the statutory minimum by eliminating probation as a sentencing option. As Thomas herself correctly notes, "all words in a statute must be interpreted so as to give them meaning and to avoid rendering any language surplusage." Appellee's Brief at 18; *see also Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961). The parties debate the significance of the sparse record of legislative intent behind the probation bar, but we have little need to resort to legislative intent when the language of the statute is so plain. Notwithstanding any other provision of law, § 841(b)(1)(A) forbids judges to sentence defendants convicted of violating § 841(a) by distributing one kilogram or more of heroin, as Thomas did, to probation.

Diagi is easily distinguished. The version of 21 U.S.C. § 846 applicable in that case contained no language establishing a mandatory minimum term of imprisonment or specifically proscribing probation. The only probation bar applicable to Diagi came from 18 U.S.C. § 3561, a general provision proscribing probation for all Class A and B felonies. Section 3561 did not contain any language similar to the "notwithstanding any other provision of law" language contained in § 841(b) (language that is now applicable to violations of § 846 as well as § 841(a), making *Diagi*'s continuing vitality suspect).[2] The only statutory minimum faced by Diagi, then, was the one-day minimum term of imprisonment implicit in the general probation ban of § 3561. By its terms, § 3553(e) trumps that mandatory minimum. The court held, therefore, that § 3553(e) authorized the sentencing court to award probation to Diagi. The court could not have held otherwise without rendering § 3553(e) a nullity, a fact that shows that *Diagi* is perfectly consistent with our own rationale in this case. Here,

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[2] *United States v. Wilson*, 896 F.2d 856 (4th Cir. 1990), is distinguishable on the same basis. The defendant in that case was convicted under 18 U.S.C. § 1952(a)(3), which carries no minimum sentence.

unlike in *Diagi*, the district court faced a clause—"notwithstanding any other provision of law"—that made the probation bar trump § 3553(e). That clause dictates our result, and distinguishes Thomas's case from Diagi's.

Section 841(b), then, requires the district court to sentence Thomas to some period of confinement. As the district court observed, however, there is little substantive difference between a sentence of probation and a very short period of confinement; we therefore also address the government's claim that the extent of the district court's departure was unreasonable.

Section 3553(e) authorizes departures upon government motion "*so as to reflect a defendant's substantial assistance* [emphasis supplied] in the investigation or prosecution of another person who has committed an offense." This language clearly supports the government's view that only factors relating to a defendant's cooperation should influence the extent of a departure for providing substantial assistance under § 3553(e). Reference to § 5K1.1 of the sentencing guidelines further buttresses the government's reading. That policy statement contains a list of factors that the sentencing court may consider to arrive at "the appropriate reduction" when departing downward on the basis of substantial assistance rendered to the government. The list is not intended to be exhaustive, but each of the factors listed concerns circumstances bearing upon the significance of a defendant's cooperation, such as its utility, reliability, risk, and timeliness. Had the Sentencing Commission wished to permit courts to consider factors unrelated to the quality of the defendant's cooperation when departing because of that cooperation, it seems likely that it would have promulgated a list of examples encompassing factors unrelated to cooperation. Courts probably invoke interpretive maxims too often, but the principle of *ejusdem generis* seems to have such force in this case that we feel obliged to trot it out. "The purpose for defining the class by illustrative particularizations accompanied by a general catchall reference is to determine how extensively the act was intended or should rea-

sonably be understood to apply." 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.18 at 177 (4th ed. 1984). We therefore conclude that § 5K1.1 permits departure only on the basis of the quality of the assistance rendered.

The district court, Thomas concedes, based its sentence not only on her assistance, but also took her extremely burdensome family responsibilities into account. Each of Thomas's three adult children is mentally disabled. Two live with Thomas; one is institutionalized. Thomas is also the legal guardian of a four year-old grandson. She cares for her children alone; Thomas last saw her husband in 1984.

She maintains, however, that § 1B1.4 of the guidelines authorized the court to factor her familial responsibilities into its departure calculus. Section 1B1.4 provides that "[i]n determining . . . whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." The application note for § 1B1.4 points out, however, that "[s]ome policy statements . . . express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes." Guideline § 5H1.6 is one such policy statement. There the Commission stated that "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the guidelines."

There is a split among the circuits that have considered whether the qualification contained in the policy statement—not "ordinarily" relevant—authorizes downward departures based on *extraordinary* family considerations. Indeed, there is a split *within* several circuits on this question. The Fifth and Sixth Circuits have intimated that § 5H1.6 permits departures based on extremely unusual family circumstances. *See United States v. Brewer*, 899 F.2d 503, 508 (6th Cir. 1990) (defendant's family and community ties held not unusual enough to justify departure on that basis); *United States v. Burch*, 873 F.2d 765, 768

(5th Cir. 1989) (family ties can be basis for departure in extraordinary cases). The Ninth Circuit says no. *See United States v. Brady*, 895 F.2d 538, 543 (9th Cir. 1990). Cases in the Fourth and Eighth Circuits go both ways. *Compare United States v. Short*, 919 F.2d 1325, 1328 (8th Cir. 1990) (defendant's family circumstances not unusual enough to support departure under § 5H1.6) *with United States v. Temple*, 890 F.2d 1042, 1043 (8th Cir. 1989) (§ 5H1.6 is a "clear statement" that family considerations are not a ground for departure); *United States v. Deigert*, 916 F.2d 916, 918-19 (4th Cir. 1990) (departure on basis of extraordinary family considerations permissible) *with United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990) (no departure authorized on basis of family considerations when probation is not a sentencing option).

We agree with the courts that read § 5H1.6 narrowly. Section 5H1.6 details the few instances when family reponsibilities are relevant:

> Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

None of these situations apply to Thomas. The district court awarded her no fine, and as we determined above, she is not eligible for probation. These are the only cases in which family considerations are relevant; unlike the guideline policy statement on departures for substantial assistance, § 5H1.6 contains no language suggesting that this list is merely illustrative rather than exhaustive. Section 5H1.6 contains no suggestion that departures may be based on family considerations whenever they strike judges as particularly compelling. Had the Commission wanted to do that, it knew how; in § 5H1.4, for example, the guidelines state that, although a defendant's physical

condition is not "ordinarily" relevant in determining whether to depart, sentencing courts may depart on the basis of "an extraordinary physical impairment." Section 5H1.6 grants no similar license. Moreover, the Commission's affirmative statement that family responsibilities are relevant when probation is an option suggests that the Commission did not intend them to be relevant when, as here, probation is *not* a sentencing option. *See McHan*, 920 F.2d at 248 (community ties not relevant to departure decision when probation is not an option); *Brady*, 895 F.2d at 543. Thomas essentially concedes this point, since she argues that the relevance of § 5H1.6 lies in the fact that it makes family responsibilities relevant when probation is an available option.

This reading is also consistent with the general philosophy that undergirds the Sentencing Guidelines. They reflect Congress's desire to base criminal punishment on the offense committed rather than on the defendant's personal characteristics. *McHan*, 920 F.2d at 247. "[O]f the fifteen grounds for departure listed in [Chapter 5, Part K of the guidelines] not a single one looks to characteristics of the defendant: ten factors examine the specific criminal conduct and the resulting harm, and five relate to the defendant's mental capacity or motive at the time of the conduct." *Id.* That the guidelines do not treat the personal characteristics of defendants as completely irrelevant is true. *United States v. Lara*, 905 F.2d 599, 604-05 (2d Cir. 1990). That their relevance is limited, however, is clear. The Commission promulgated the policy statements in Part H of Chapter 5 of the guidelines in response to Congress's directive "to consider whether certain specific offender characteristics 'have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence' " and to take them into account only to the extent they are determined relevant by the Commission." U.S.S.G. Ch.5, Pt.H, intro. comment. The commentary to Part H was recently amended to clarify the relationship between 28 U.S.C. § 994(e) and certain policy statements; that statute speaks to the general inappropri-

ateness of considering, among other things, family ties and responsibilities. *Id.* (Amendment No. 357). The policy statements within Part H should therefore be read as establishing the limited parameters within which certain offender characteristics—family ties and responsibilities among them—are relevant.

Thomas's sentence, then, may be reduced only on the basis of the assistance she provided to the government. Departures, whether upward or downward, must be linked to the structure of the guidelines. *United States v. Fonner*, 920 F.2d 1330, 1331-32 (7th Cir. 1990) (upward departures); *United States v. Gentry*, 925 F.2d 186, 189 (7th Cir. 1991) (downward departures). We recognize that, by their very nature, departures involve considerations that the guidelines do not already take into account. To say that the sentencing court must link the degree of departure to the guidelines means not that the court must employ existing guideline provisions to determine the appropriate degree of departure, but that it must employ the rationale and methodology of the guidelines when considering cases not adequately addressed by existing guidelines. The sentencing judge is thus required to articulate the specific factors justifying the extent of his departure and to adjust the defendant's sentence by utilizing an incremental process that quantifies the impact of the factors considered by the court on the defendant's sentence. The district court's decision to grant Thomas probation was, as we have seen, based on an erroneous interpretation of § 841(b) and on consideration of Thomas's family responsibilities. At no point did the district court indicate that its decision to grant Thomas probation was based on the cooperation she had given the government; we therefore have no basis for determining what portion, if any, of the departure reflected Thomas's cooperation.

The government's recommendation should be the starting point for the district court's analysis. Application Note 3 to § 5K1.1 directs the sentencing court to give "substantial weight" to the government's evaluation of the defendant's assistance. The government recommended that the

court sentence Thomas to six years in prison. Had Thomas fully cooperated, the government submits that it would have recommended a five-year sentence. The prosecutors believed, however, that Thomas failed to cooperate fully in that portion of the investigation focusing on drug trafficking activities in Detroit, where Thomas resides. They reported to the district court that, in their opinion, Thomas had been less than candid when asked to describe her distribution network in that city. The four-year reduction recommended by the government equates to a five-level reduction in the base offense level of thirty-two (the lowest possible offense level for which a ten-year sentence may be imposed).

The district court should examine the government's recommendation in light of factors like, but not limited to, those listed in § 5K1.1.(a). As for the weight to accord such factors, the guideline provision that is most directly analogous to a downward departure for rendering substantial assistance is § 3E1.1, which authorizes a two-level reduction in the base offense level for acceptance of responsibility. By way of negative inference, the two-level enhancement for obstruction of justice, § 3C1.1, may also be relevant. These provisions suggest that departures based on a defendant's cooperation with authorities may warrant something on the order of a two-level adjustment for each factor found by the court to bear similarly on its evaluation of the defendant's cooperation. They provide but imperfect guidance, however, since weighing the impact of any given factor on the quality of the defendant's cooperation is an imprecise art, at best. We do not intend to preclude the district court from utilizing a scale with more gradations in order to assign greater or lesser weight to the factors it considers. We will simply renew our caution that "departures of more than two levels should be explained with a care commensurate with their exceptional quality." *United States v. Ferra*, 900 F.2d 1057, 1064 (7th Cir. 1990).

We express no view as to whether Thomas's assistance merits a larger (or smaller) departure from the ten-year

statutory minimum than that recommended by the government. On remand, if the district court imposes a different sentence, it should explain in what respects the government's recommended departure is inappropriate by reference to factors like those enumerated in § 5K1.1(a) and their significance to the court's evaluation of the quality of the assistance rendered by Thomas. Appellee's sentence is vacated and the case remanded to the district court for resentencing consistent with this opinion.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: April 11, 1991

BEFORE: Honorable Joel M. Flaum, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

No. 90-2183

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MATTIE LOU THOMAS,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 CR 131, Judge Milton I. Shadur

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, VACATED and REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 23, 1991.

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

No. 90-2183 vs.

MATTIE LOU THOMAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 131—Milton I. Shadur, *Judge.*

ORDER

On consideration of the petition for rehearing, supplemental petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 30, 1991

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon.
Hon.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. 90-2183

MATTIE LOU THOMAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 131—Judge Milton I. Shadur

This matter comes before the court for its consideration of the **MOTION TO STAY THE MANDATE PENDING CERTIORARI** filed herein on 5/28/91, by counsel for the defendant. On consideration thereof,

IT IS ORDERED that said motion is **GRANTED** and the mandate in this appeal is **STAYED** to and including 7/1/91.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

UNITED STATES OF AMERICA

v. Case Number: 89 CR 131-1

MATTIE LOU THOMAS

Jeffrey B. Steinback
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count 1 of the indictment.
☐ was found guilty on count(s) ____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: 21 841(a)(1).

Nature of Offense: possessing, with intent to distribute, heroin, a Schedule I Narcotic Drug Controlled Substance.

Count Number(s): 1.

The defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00, which shall be due within 14 days.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Date April 25, 1990

/s/ Milton I. Shadur
Judge

PROBATION

The defendant is hereby placed on probation for a term of FIVE (5) YEARS. This sentence is imposed in accordance with the provisions of 18 USC §3553(e), based on the government's motion reflecting defendant's substantial assistance in the investigation of another person or persons who has or have committed criminal offenses.

The Court finds that defendant is not in a position to sustain a fine and therefore no fine is imposed.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condiction of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

Defendant is to continue to cooperate with the government in accordance with the terms of the plea agreement.

Defendant is to perform community service of a nature and on a schedule to be arranged with the Probation Department in her district of residence for a total of 1200 hours at the minimum rate of 60 hours per calendar quarter.

STANDARD CONDITIONS OF SUPERVISION

* * * * *